Supreme Court, U.S.
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No. 95-1372

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

GRADY and LILLIE AUVIL, ROBERT and CHARLOTTE BRODY, BURT and ELLY CHESTNUT, BERT and EVELYN STENNES d/b/a Squaw Creek Ranch, Inc., and all other Washington red apple growers similarly situated,

Petitioners,

v.

CBS "60 MINUTES", a foreign corporation, and COLUMBIA BROADCASTING SYSTEM (CBS), a foreign corporation, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

The Petition and the opposition brief make three propositions plain. First, there is no dispute about the national significance of this case. Respondent CBS, Inc. ("CBS") does not take issue with Petitioners' assertions that the federal courts are increasingly being asked to address questions of scientific causation. Nor do they dispute that the causation-related controversy at issue in this case -- whether Alar is the "most potent cancer-causing agent in our food supply" -- has been far and away the most highly visible such controversy in this country in recent years.

Second, there is no dispute that Petitioners introduced in the district court a substantial body of evidence that challenged the accuracy of information on CBS's "60 Minutes" broadcast. In particular, Petitioners introduced evidence that : (1) animal studies are inconclusive regarding whether either Alar or UDMH (Alar's breakdown chemical) is even a *rodent* carcinogen; (2) there is no basis for concluding that low dosages of those chemicals will cause cancer in humans, particularly in light of the absence of any epidemiological evidence linking Alar/UDMH with cancer; (3) Alar is far from being "the most potent cancer-causing agent in our food supply"; indeed, humans regularly consume hundreds of naturally occurring pesticides that are far more carcinogenic than Alar and UDMH were alleged to be by CBS; and (4) there is no basis for concluding that children are more in danger than adults of contracting cancer from apples or that Alar consumption by children will lead to increases in childhood cancer. *See* Petition at 6-8. CBS's opposition brief provides a lengthy overview of the evidence submitted by CBS in support of its summary judgment motion, but CBS does not challenge the Petition's rendition of evidence submitted by Petitioners in opposition to that motion. Of course, for purposes of review of an order granting a summary judgment motion, it is the non-moving party's admissible evidence that must be accepted as true.

Third, not even CBS contends that its broadcast was

true in every detail. Rather, in both its opposition brief and in the courts below, CBS argued merely that the broadcast was "substantially true." *See, e.g.*, Brief in Opposition ("Opp. Brief") at 22, 23, 25. CBS argued, "Under Washington law, a defamation plaintiff cannot prevail merely by pointing to minor inaccuracies in a broadcast that do not alter the 'gist or substance of the report when considered as a whole.'" *Herron v. KING Broadcasting Co.*, 112 Wash. 2d 762, 769, 776 P.2d 98, 102 (1989)." Opp. Brief at 26 n.78. In light of CBS's concession that the "60 Minutes" broadcast might have contained "minor inaccuracies," the Ninth Circuit's failure even to note those inaccuracies and to consider whether they altered the "gist" of the broadcast is highly problematical.

Although CBS's opposition brief makes no attempt to defend the Ninth Circuit's failure to address the substantial evidence of falsity submitted by Petitioners in opposition to the summary judgment motion, CBS does purport to respond to each of the reasons put forward for granting this Petition. Those responses fall far wide of the mark.

CBS appears to have misinterpreted Petitioners' initial argument as an attack on the admissibility of CBS's expert testimony. Opp. Brief at 15-21. Petitioners do not argue that CBS's evidence should have been excluded; rather, they contend that the lower courts misinterpreted Fed. R. Civ. P. 56 in ruling that a jury should not be permitted to pass upon the falsity of a scientific proposition so long as at least some scientific experts believe in good faith that the proposition is true.

CBS also is incorrect in asserting that the Ninth Circuit affirmed based on a ground raised by CBS. Opp. Brief at 21-25. The Ninth Circuit held that CBS was entitled to entry of judgment because the evidence demonstrated that every statement in the "60 Minutes" broadcast was literally true and Petitioners had failed to provide sufficient evidence that *any* statement in the broadcast was false. As

CBS's brief makes clear, CBS has relied not on the literal truth of all statements in the broadcast but on their "substantial truth." *Id.* at 23. A claim of "substantial truth" admits the possibility of minor falsehoods but argues that such falsehoods are inconsequential because they do not alter the gist of the statement when considered as a whole. In order to meet CBS's claim of substantial truth, Petitioners were required to focus their arguments on the overall message of the CBS broadcast. Thus, in affirming the grant of summary judgment on the basis of the alleged literal truth of every statement in the broadcast, the Ninth Circuit relied on a ground not raised by CBS; indeed, a ground inconsistent with CBS's position that its broadcast might contain some inaccuracies but was nonetheless substantially true when considered as a whole. Petitioners ask the Court to hear this case in order to decide whether Rule 56 prohibits entry of summary judgment based on a ground not asserted by the moving party.

CBS also errs in asserting that the Ninth Circuit did not invoke the First Amendment in affirming the grant of summary judgment. The appeals court justified its ruling against libel-by-implication tort liability by stating that the possibility of such liability would create "uncertainty" among publishers and that "such uncertainty raises the spectre of a chilling effect on speech." Pet. App. 15a-16a. The reference to libel law's potential "chilling effect on speech" is a staple of First Amendment jurisprudence and, within the context of the Ninth Circuit's decision, is an obvious reference to First Amendment speech protections. The Ninth Circuit's First Amendment ruling is in direct conflict with the decisions of two other federal appeals courts and merits review by this Court.

I. CBS'S *DAUBERT* ARGUMENT RESPONDS TO AN ARGUMENT NOT RAISED BY PETITIONERS

A substantial portion of CBS's brief is devoted to

responding to an argument not raised by the Petition. *See* Opp. Brief at 15-21. At the same time, CBS has failed to respond to the argument that Petitioners did raise.

CBS apparently misunderstood the basis of Petitioners' citation to the Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993). *Daubert* addressed the standards to be applied by district courts under the Federal Rules of Evidence in determining whether expert testimony is admissible as evidence. Interpreting Petitioners' citation to *Daubert* as an attack on the admissibility of the testimony of its experts, CBS argues: (1) Petitioners waived that argument by failing to raise it in the Ninth Circuit; and (2) the expert testimony should not be excluded because it was reasonable for CBS's experts to rely on rodent studies in reaching their conclusions regarding Alar's human carcinogenicity. Opp. Brief at 16-18.

Contrary to CBS's assertions, the Petition raises no issues regarding the admissibility of expert testimony under the rules of evidence. Rather, Petitioners cited *Daubert* for the proposition that the essence of any scientifically valid methodology is that its conclusions can be tested and determined to be true or false. Petition at 18 (citing *Daubert*, 113 S. Ct. at 2797). The lower courts rejected this central tenet of *Daubert* when they indicated that a scientific proposition can never be proven false (and thus is not a proper subject for jury deliberation) so long as there is sufficient uncertainty about the proposition that reasonable scientists could disagree regarding its truth or falsity.

Petitioners cited *Daubert* to make clear that normal Rule 56 standards are not altered simply because the issues in dispute involve complex scientific questions. Rather, as Petitioners have consistently argued throughout this case, their introduction of a great body of evidence as to the falsity of the "60 Minutes" broadcast precluded entry of

summary judgment for CBS under Rule 56.[1] The Court should grant the Petition in order to review the application of Rule 56 to complex scientific questions.

CBS confines its entire discussion of Rule 56 to a single footnote. *See* Opp. Brief at 21 n.70. CBS argues that entry of summary judgment was proper under Rule 56 because "disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." *Id.* (quoting *T.W. Elec. Serv., Inc. v. Pacific Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir. 1987). Suffice to say that the evidence of falsity cited in the Petition (at 6-8) and not contested by CBS constitutes far more than a dispute "over irrelevant or unnecessary facts."

Nor can CBS avoid the strictures of Rule 56 by arguing that "[t]his lawsuit merely concerned risk assessment -- . . . that is, the likelihood of harm to humans or the environment," and thus that "the debate over Alar's risks was a political dispute" rather than a factual dispute. *Id.* at 20-21 n.69 (citations omitted). To the contrary, this case turns on the truth or falsity of factual assertions contained in the "60 Minutes" broadcast -- including the assertion that Alar is "the most potent cancer-causing agent in our food supply." Given the overwhelming evidence of the falsity of that assertion, entry of summary judgment for

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[1] CBS's waiver argument is without merit. Petitioners' Ninth Circuit brief argued repeatedly that the district court had misapplied Rule 56 in granting summary judgment to CBS. That Petitioners did not cite *Daubert* in the Ninth Circuit in support of that argument is of no moment.

CBS is correct that Petitioners cited *Daubert* in the district court in support of their motion to strike the testimony of CBS's expert witnesses. Brief in Opposition at 15. However, Petitioners did not appeal the denial of that motion to the Ninth Circuit and do not seek to revive the motion before this Court.

CBS was inappropriate.[2]

CBS complains that Petitioners should not have cited to a very recent non-record National Research Counsel study (*see* NRC, *Carcinogens and Anticarcinogens in the Human Diet* (Feb. 1996)) that debunks the notion that Alar is a potent cancer-causing agent. Opp. Brief at 16 n.57. While we can understand why CBS would be unhappy to have the study (issued by a 20-member panel of the NRC) brought to the Court's attention, it is precisely the type of authoritative scientific study that the Court routinely takes notice of. *See* Wright, Miller & Cooper, *Federal Practice and Procedure*, § 4036 at 34-35 (1985). The NRC is an arm of the National Academy of Science, a government body founded by Congress in 1863 to investigate scientific and artistic matters. *See* 36 U.S.C. §§ 251 *et seq.*[3] In any event, the NRC study does not state anything that is not already in the record; Petitioners' experts arrived at the same conclusions in their affidavits.

Finally, CBS repeatedly argues that Petitioners failed

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[2] CBS's citation to a seminal article by Dr. Bruce Ames to support the "substantial truth" of the broadcast's "most potent" allegation is highly disingenuous. *See* Brief in Opposition at 26 n.80 (citing L.S. Gold, B. Ames, *et al.*, "Rodent Carcinogens: Setting Priorities," 258 *Science* 261, 262-64 (1992). The major thrust of that article was that policymakers should be less alarmed about the presence of potentially-carcinogenic synthetic chemicals in our food supply, because numerous chemicals that are present naturally in the food supply have been shown in rodent tests to be far more carcinogenic than any chemicals added by man to the food supply. The article included Alar/UDMH on a list of potentially-carcinogenic synthetic chemicals *not* for the purpose of warning of the dangers of Alar but to demonstrate that synthetic chemicals such as Alar pose a far lower human cancer risk than do numerous naturally-occurring substances.

[3] Ironically, CBS itself cites to a non-record NRC report. Opp. Brief at 18 n.64 (citing NRC, *Issues in Risk Assessment* (1993)).

to offer evidence that Alar is safe. *See, e.g.*, Opp. Brief at 13. CBS notes that Petitioners' experts stated that they could not prove to a scientific certainty that Alar does not cause cancer in humans. *Id.* at 13 n.49. But in order to withstand summary judgment, Petitioners are under no obligation to prove to a scientific certainty that Alar is safe. Rather, they need only prove by a preponderance of the evidence that statements included in the "60 Minutes" broadcast (such as that Alar is the "most cancer-causing agent in our food supply") are false. Unfortunately, the Ninth Circuit appears to have fallen prey to CBS's efforts to impose on Petitioners an unwarranted burden of proving Alar's safety to a scientific certainty. *See, e.g.*, Pet. App. 13a. The Court should grant review to correct this clear distortion of Rule 56.

II. THE NINTH CIRCUIT AFFIRMED BASED ON A GROUND NOT RAISED BY CBS

Petitioners also ask the Court to grant review to resolve an issue that has divided the appeals courts: whether Rule 56 permits entry of judgment for a party on the basis of an argument not raised by the moving party. CBS does not dispute that the lower courts are in need of guidance on this issue. Rather, its sole response is to argue that it did, in fact, raise the argument relied on by the Ninth Circuit in affirming the grant of summary judgment. Opp. Brief at 21-25.

CBS's argument is without merit. The Ninth Circuit held that CBS was entitled to entry of summary judgment because the evidence demonstrated that every statement in the "60 Minutes" broadcast was literally true and Petitioners had failed to provide sufficient evidence that *any* statement in the broadcast was false. Pet. App. 10a-13a. That holding bears little resemblance to the arguments raised by CBS in the courts below or in this Court. Given the strong evidence that statements in the broadcast (particularly the "most potent" statement) were not literally true,

CBS has argued alternatively that such statements were at least "substantially true." As note above at 2, a statement containing minor inaccuracies can still qualify as substantially true (and thus unactionable under Washington law) if the inaccuracies do not alter the gist of the statement when considered as a whole. *Herron*, 112 Wash. 2d at 769.

But one searches the Ninth Circuit's opinion in vain for any discussion of the overall "gist" of the "60 Minutes" broadcast or whether the statements alleged by Petitioners to be inaccurate have any effect on that "gist." Rather, the Ninth Circuit overlooked CBS's concession that the "most potent" statement was not literally true and affirmed summary judgment on the basis of literal truth. The Ninth Circuit's decision is in direct conflict with the D.C. Circuit's decision in *McBride v. Merrell Dow and Pharmaceuticals*, 800 F.2d 1208 (D.C. Cir. 1986), which held that Rule 56 does not permit entry of summary judgment against a party not on notice of the need to marshall evidence with respect to the ground upon which summary judgment is to be granted. Petitioners had no reason to focus their attention on the literal truth of individual statements in CBS's broadcast when CBS itself was focusing on the "gist" of the entire broadcast and was seeking summary judgment on the basis of "substantial truth."

III. THE NINTH CIRCUIT'S FIRST AMENDMENT RULING CONFLICTS WITH RULINGS FROM TWO OTHER CIRCUITS

Despite CBS's protests, one cannot seriously dispute that the Ninth Circuit's libel-by-implication ruling has strong First Amendment underpinnings. The Ninth Circuit held that a literally true statement can never be actionable in tort because a contrary rule "raises the spectre of a chilling effect on speech." Pet. Ap. 15a-16a. CBS is correct that the appeals court never mentioned the First Amendment by name, but the "chilling effect" language is an obvious appeal to First Amendment values. A federal

appeals court has no mandate to adopt its own set of prudential rules governing a state-law product disparagement action, so the "chilling effect" discussion could only be a reference to the First Amendment. Indeed, this Court has often used the phrase "chilling effect" in its discussion of First Amendment limitations on libel actions. *See, e.g., Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986)("[S]uch a 'chilling effect' would be antithetical to the First Amendment's protection of true speech on matters of public concern.") Indeed, it would have been surprising if the Ninth Circuit had *not* addressed any First Amendment issues, given that significant portions of both parties' Ninth Circuit briefs heavily emphasized First Amendment issues.

CBS notes that the Ninth Circuit also based its libel-by-implication ruling on its interpretation of Washington state law. But the appeals court cited no Washington Supreme Court decisions but rather relied on a single libel-law decision from the Washington Court of Appeals. CBS is simply incorrect that the Ninth Circuit's interpretation of Washington state law is not subject to review by this Court. Opp. Brief at 28 n.86. The Court has not hesitated to review the lower federal courts' interpretation of state law where it reflects plain error. *Planned Parenthood of Southeast Pennsylvania v. Casey*, 505 U.S. 833, 880 (1991).[4] Moreover, the Ninth Circuit gave no indication that it believed that its state-law rationale provided sufficient grounds by itself to reject liability under a libel-by-implication theory; indeed, the court would not have needed to reach the First Amendment issue had it so believed. When a *state court* opinion purports to rely on both state and federal grounds, the Court has felt free to review the decision unless the opinion includes a "plain

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[4] As the Petition noted (at 27 n.18), the Ninth Circuit decided the libel-by-implication issue without the benefit of briefing and simply ignored contrary precedent from the Washington Supreme Court.

statement" that the state court is relying on state law. *Illinois v. Rodriguez*, 497 U.S. 177 (1990). Federalism concerns are not at issue in cases, as here, on review from a federal court; thus, the "plain statement" rule suggests that the Ninth Circuit's citation to state law is no impediment to review of the Ninth Circuit's First Amendment ruling.

The Ninth Circuit's ruling that the First Amendment prohibits libel-by-implication liability is in clear conflict with decisions from the Fourth and D.C. Circuits. There is no merit to CBS's contention that those two decisions were based on state law rather than the First Amendment. Indeed, not only did the Fourth Circuit base its decision explicitly on First Amendment grounds, it also cited the D.C. Circuit's decision as support for its First Amendment rule. *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1092-93 (4th Cir. 1993)(citing *White v. Fraternal Order of Police*, 909 F.2d 512 (D.C. Cir. 1990)).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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